IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 512

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.,

Petitioner,

against

EUGENE T. SINGER.

No. 527

EUGENE T. SINGER,

Petitioner,

against

THE YOKOHAMA SPECIE BANK, LIMITED,

and

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PLAINTIFF

ALBERT R. CONNELLY,
Counsel for Plaintiff (Respondent in No. 512 and Petitioner in No. 527),
15 Broad Street,
New York 5, N. Y.

GEORGE S. COLLINS,
GEORGE M. BILLINGS,
JACK W. ROBBINS,
Of Counsel.

April 11, 1950.

INDEX

TABLE OF CASES

TABLE OF STATUTES

TABLE OF EXECUTIVE ORDERS

MISCELLANEOUS CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 512

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.,

Petitioner,

against

EUGENE T. SINGER.

No. 527

EUGENE T. SINGER,

Petitioner,

against

THE YOKOHAMA SPECIE BANK, LIMITED,

and

WILLIAM A. LYON, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF

This case is here on cross-petitions for writs of certiorari to the New York Court of Appeals, filed in this Court by the Superintendent of Banks of the State of New

York (herein sometimes called the Superintendent) defendant in the court below (No. 512) and by Eugene T. Singer, plaintiff in the court below (No. 527), which cross-petitions were granted on February 20, 1950. In this brief we shall deal with the questions raised by both petitions.

Opinions Below

The case was twice reviewed by the Court of Appeals of New York. The opinion upon the appeal from final judgment after trial is reported: 299 N. Y. 113 (R. 530);* *motion for re-argument denied*, 300 N. Y. 549 (R. 586). An amendment of the remittitur is reported: 299 N. Y. 791 (R. 541). The opinion on the prior appeal from summary judgment is reported: 293 N. Y. 542 (R. 525); *motion for re-argument denied*, 294 N. Y. 689. The Appellate Division of the New York Supreme Court did not render an opinion upon the appeal from final judgment after trial; the opinion of trial term (R. 322-26) was not reported. Upon the prior appeal from summary judgment no opinion other than the opinion of the Court of Appeals was officially reported. The opinion rendered at Special Term, New York Supreme Court, was unofficially reported: 47 N. Y. S. 2d, 881: the Appellate Division affirmed without opinion.

Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257; 62 Stat. 929. The judg-

*Unless otherwise noted, figures in parentheses refer to pages of the record on appeal; figures in brackets refer to pages of the record showing receipt of a document in evidence.

ment of the New York Court of Appeals was rendered on April 15, 1949 (R. 539). A motion for re-argument was made on July 8, 1949 (R. 590), and was denied on October 6, 1949 (R. 586). The questions presented for review by the plaintiff involve primarily the construction of Executive Orders Nos. 8389 and 9193 and licenses, orders and other documents issued to the Superintendent by the Secretary of the Treasury and by the Alien Property Custodian. Their construction and application to the facts were extensively briefed to the Court of Appeals by both parties upon the second appeal (see 299 N. Y., at pp. 140-142), and the opinion of the Court, almost in its entirety, is devoted to them. They were decided in plaintiff's favor in the lower State courts.

Statutes Involved

The case involves in particular Sections 5(b) and 7(b) of the Trading with the Enemy Act, Executive Orders No. 8389, as amended by Executive Orders No. 8785 and 8832, Executive Order No. 9193, and General Ruling No. 12 (7 F. R. 2991), and, in addition, the Rules and Regulations issued pursuant to said provisions of the Trading with the Enemy Act and said Executive Orders. Relevant provisions thereof, except for Section 7(b) of the Trading with the Enemy Act, are included in the Appendix to the brief of the Superintendent in this Court (pp. 47-77). The relevant provision of Section 7(b) of the Trading with the Enemy Act is annexed to this brief, as Appendix A.

The appeal also involves provisions of Section 606, subd. 4, of the Banking Law of the State of New York.

A copy thereof is set forth in the Appendix to the Superintendent's brief (p. 77).

Statement of the Case

The questions presented by the cross-petitions involve consideration of a somewhat complex state of facts. In broad outline, however, the case may be simply stated.

Plaintiff, as assignee of the Standard-Vacuum Oil Company (herein sometimes called Standard) is a creditor of the Yokohama Specie Bank (herein sometimes called the Bank) in the principal amount of $557,561.25. The parties are not in dispute as to the existence of that debt; the controversy between them relates solely to the question whether, in respect of that debt, plaintiff has the status of a preferred creditor under the provisions of Section 606(4) of the New York Banking Law.* Under that statute, the Superintendent, as liquidator of the business and property in New York of the Bank, is required to pay the claims of two classes of creditors—those who have claims arising out of transactions had by them with the New York agency of the Bank, and those whose names appear as creditors on the books of such agency—before disposing of the remaining assets of the Bank in his possession.

Plaintiff has been determined by the New York Court of Appeals to have the status of a preferred creditor of the Bank within the meaning of that statute by virtue of a transaction had by Standard with the Bank's New York Agency on August 29, 1941. That transaction consisted of a com-

*New York L. 1946, c. 65; all subsequent references in this brief to section 606, subd. 4, will be to such statute as it stood prior to its amendment in 1946. The 1946 amendment expressly provides that it shall not be applied retroactively.

munication to Standard in New York from the Bank's New York Agency, advising that the Bank's New York Agency had received cable instructions from the Bank's Yokohama office to pay to Standard the sum in question and that it would do so upon issuance of a license under Executive Order No. 8389 (the provisions of which had been extended to Japan on July 26, 1941, effective as of June 14, 1941).

It is the position of the Superintendent that Executive Order No. 8389 not only prohibited (unless licensed) payment of the Bank's debt to Standard, but also prohibited (unless licensed) the transaction that gave rise to plaintiff's preferred status under the New York Banking Law—i.e., the above-mentioned communication from the Bank's New York Agency to Standard.

The Superintendent further contends that, notwithstanding the provisions of General Ruling No. 12 (7 F. R. 2991) with reference to retroactive licensing and to the treatment of prohibited transfers for purposes of litigation, the absence of a specific license under Executive Order No. 8389 authorizing the transaction in question prevents the entry of any judgment in favor of plaintiff based upon such transaction.

It is the position of the plaintiff that none of the transactions underlying his claim was prohibited by Executive Order No. 8389, as amended; that although payment of his claim could not have been made without an appropriate license, such payment has in fact been authorized; and that the Superintendent has been free, in so far as concerns Executive Order No. 8389, to make payment since January 14, 1942 or, at the latest, since October 20, 1942 and, consequently, has incurred an obligation to pay interest on the principal amount of plaintiff's claim.

The New York Court of Appeals, affirming a prior decision in the case upon that point (*Singer* v. *Yokohama Specie Bank, Ltd.*, 293 N. Y. 542; R. 525-9), held that Executive Order No. 8389 and associated orders and regulations did not prevent the accrual, in favor of Standard, of a claim against the Bank arising out of a transaction with its New York Agency within the meaning of section 606(4) of the New York Banking Law and that, under that section of the Banking Law, his claim was entitled to payment by the Superintendent, as liquidator of said Bank, out of the proceeds of its business and property in his possession. The Court accordingly affirmed the judgments of the courts below in so far as they had sustained plaintiff's claim in that respect.

The Court of Appeals ruled, however, that the provisions of Executive Order No. 8389 and associated orders, rulings and regulations prevent the payment of plaintiff's claim, unless such payment is specifically licensed under Executive Order No. 8389, and that none of the documents in evidence constitutes such a license (299 N. Y. 113, 125). It accordingly reversed the judgments of the courts below in so far as they had ruled unanimously that payment of said claim may be made without further license, and also, solely upon the stated ground that such a license is necessary and that none has been issued (299 N. Y. 113, 125, 126), struck from said judgments and disallowed interest in the sum of $146,279.62, which also had been unanimously awarded to plaintiff by the lower courts.

The Questions Presented

The following questions of law are presented to this Court by the cross-petitions:

First, whether any of the transactions underlying plaintiff's claim was prohibited by (unless licensed under) the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto.

This question is presented by both petitions.

Second, assuming that none of the transactions underlying plaintiff's claim was prohibited by the Order, whether the Superintendent has heretofore been authorized by documents issued by the Secretary of the Treasury or by the Alien Property Custodian, to pay plaintiff's claim.

This question is presented by the plaintiff.

Third, whether payment of plaintiff's claim by the Superintendent is now subject to Executive Order No. 8389, in view of the release by the Secretary of the Treasury to the Alien Property Custodian of control over the liquidation of the Bank's business and property in New York.

This question is presented by the plaintiff.

Fourth, assuming that one or more of the transactions underlying plaintiff's claim was prohibited by Executive Order No. 8389, and assuming further that payment of such claim is now subject to said Order whether the judgment under review, adjudicating the validity of plaintiff's claim under the preference provisions of the New York Banking Law, but providing that payment thereof is "subject to the provisions of

Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto", is authorized by and valid under General Ruling 12 (7 F. R. 2991).

This question, which is presented by the Superintendent's petition, need be considered only in the event that the First and Third questions stated above are determined adversely to the plaintiff's contentions.

The Facts

The Superintendent's appeal raises issues relating to the validity and the legal effect of foreign exchange transactions lawfully initiated in Japan before the extension of foreign funds control to Japan, but the completion of which became subject to such control when the provisions of Executive Order No. 8389 (as amended on June 14, 1941, by Executive Order No. 8785) were extended to Japan on July 26, 1941,* four months or more after the transactions' inception.

As we have noted above, an adequate statement of the case requires a somewhat detailed review of a complex state of facts. The necessity for such review is emphasized by the Superintendent's consistent avoidance of factual analysis and his failure, in referring to the transactions underlying plaintiff's claim, to distinguish between actual transactions and contemplated transactions, between transactions that took place in Japan and transactions that took

*Executive Order 8832 (6 F. R. 3751), issued on that date, extended such control to Japan as of June 14, 1941. General License 54, issued on July 26, validated all transactions forbidden solely because involving property in which, before, but not after, said July 26, 1941, Japan or China or their nationals had an interest: 6 F. R. 3722.

place in New York, or between pre-war and war-time laws and regulations. In view of the metaphysical character of some of the legal concepts here involved, precise factual analysis is essential. Accordingly, we shall here state the relevant facts, as briefly as may be consistent with completeness.

The Parties

Eugene T. Singer, Treasurer of Standard from 1934 to 1946 (R. 94) is the assignee of a claim which originally accrued in favor of Standard against the Bank (Ex. 9, R. 370 [119]). The assignment (the validity of which is not here in issue) did not operate to transfer any beneficial interest in the claim, all of which remained in Standard (R. 431) so that, for all purposes material here, Standard may properly be regarded as the real plaintiff.

Standard is a Delaware corporation which, prior to the late war, was engaged in the business, among others, of selling petroleum products in the Far East, including Japan. Its principal office was in New York City. It had a branch office at Yokohama, Japan (R. 35, 94, 95).

The Bank is a Japanese banking corporation. It had several branch offices in the United States, one of which (the New York agency) was located in New York City.* Prior to the war, the Superintendent of Banks of New York, acting under Article V of the New York Banking Law, had licensed the Bank to carry on at its office at 120 Broadway, New York City, the foreign remittance and foreign exchange phases of the banking business. The Bank was not

*See Annual Report of the Alien Property Custodian for the Fiscal Year ending June 30, 1944 (pp. 87-90).

authorized to act in New York as a bank of deposit, or to engage generally in the banking business there (R. 35; 477, 478 [332]).

At this point, it may be appropriate to emphasize that the Bank's New York Agency was merely a branch of the Bank and was not a separate corporate entity. The Superintendent's frequent references to the Agency as if it were a separate entity (see e. g. Supt. Br. pp. 8, 10, 28), are likely to be misleading. For one purpose—and for one purpose only—may the Agency properly be regarded as a separate entity. Executive Order No. 8389, as amended, defines the term "banking institution" as used in the Order to apply separately to the home office and each branch of a banking institution (Section 5, par. F). The term "banking institution" appears in Sec. 1 A, with reference to transfers of credit, and in Sec. 1 B, with reference to payments. Accordingly, a transfer of credit between the home office of the Bank and its New York Agency is a transfer of credit between a banking institution within the United States and a banking institution outside the United States within the meaning of Section 1 A; and a payment by or to the New York Agency is a payment by or to a banking institution within the United States within the meaning of Section 1 B. In so far as this case is concerned, however, that exhausts the possibility of properly treating the Bank's New York Agency as if it were an entity separate and apart from the Bank.

The Superintendent* is sued herein as liquidator of the business and property of the Bank in the State of New

*Following entry of the judgment here under review, William A. Lyon succeeded Elliott V. Bell as Superintendent of Banks of the State of New York and, accordingly, has been substituted as a party to these proceedings by order dated March 13, 1950.

York. Upon the outbreak of the war with Japan, acting pursuant to provisions of the New York Banking Law and as provided in section 606 thereof, he became and continues to be the statutory liquidator of the business and property of the Bank in the State of New York (R. 35, 40).

The Office of Alien Property of the United States Department of Justice is the successor to the Office of Alien Property Custodian, created by Executive Order 9095 issued on March 11, 1942. As such successor, it is entitled to receive the excess proceeds remaining in the hands of the Superintendent as liquidator of the Bank's business and property in New York after payment of preferred claims under the New York Banking Law.

Underlying Transactions in Japan

The action is based upon four uncompleted foreign exchange transactions, each involving Standard's purchase from the Bank, in Japan, of fixed sums in dollars, for payment to Standard, at New York, five months later. Each of the four transactions was initiated by a forward foreign exchange contract. Those contracts were entered into by Standard and by the Bank at Yokohama, Japan, in February and March, 1941. The contracts are in writing, and translations of them are in evidence.* Under each of them, Standard bought from the Bank, and the Bank sold to Standard, stated sums in dollars, to be paid for by stated

*Copies and translations of these contracts and of the Japanese licenses under authority of which they were entered into were received by the Superintendent from the War Department after the close of the trial. By stipulation of the parties, approved by the trial court (R. 508), they are deemed marked in evidence [R. 502-504].

sums in Japanese yen. Each provides for delivery of the dollars so purchased to Standard, at New York, in July or August, 1941. Each refers upon its face to a permit of the Japanese Government (also received in evidence), under authority of which it was entered into (R. 398-405 [502-4]). In each case such permit shows that the purpose of the dollar purchase was to remit to Standard, at its head office, at New York, the net proceeds of sale of ship's cargoes of kerosene, machine oil or low-grade gasoline which Standard expected to purchase at various points in the Orient, the United States or England, for shipment to Japan (R. 382-397). Thus the foreign exchange contracts, when read in conjunction with the Japanese permits, fixed all the terms under which those four exchange transactions were to be carried out.

At the times when those four forward foreign exchange contracts were entered into, they were not unlawful, nor were they actually or potentially at variance with any national policy then in existence. The latest of them antedated the actual date of extension of freezing control to Japan by more than four months, and the so-called effective date of such extension by almost three months. Each of them antedated, also, the date of the President's declaration of an Unlimited National Emergency, on May 27, 1941,* by more than two months. When they were entered into, national policy favored trade with Japan of the sort which they reflected. As stated by President Roosevelt on July 24, 1941:**

> "Whether they (the Japanese) had at that time aggressive purposes to enlarge their empire southward, they didn't have any oil of their own up in the north. Now, if we cut the oil off, they probably would have gone down to the Dutch East Indies a year ago and you would have had war.

*55 Stat. 1647.

**Reported, New York Times, July 25, 1941, p. 5.

> "Therefore, there was—you might call—a method in letting this oil go to Japan, with the hope—and it has worked for two years—of keeping war out of the South Pacific for our own good, for the good of the defense of Great Britain and the freedom of the seas. * * *
>
> "It was very essential from our own selfish point of view of defense to prevent a war from starting in the South Pacific. So our foreign policy was—trying to stop a war from breaking out down there."

Finally, when those contracts were entered into, foreign funds control was neither a weapon of economic warfare nor a means of protecting this nation from subversive activities of the Axis powers; it was not until June 14, 1941, that Germany, Austria, Italy, or any of their allies was brought within the provisions of Executive Order 8389.* Prior to that date, freezing control was applied solely to, and for the protection of, the overrun European nations and their nationals.

Before those contracts had been performed, the Japanese permits under which they had been entered into were suspended by the Japanese Government. On August 27, 1941, they were reinstated (R. 345).** On August 29, the head office of the Bank at Yokohama, by telegraph, confirmed by letter, directed the Bank's New York Agency to pay $557,561.25 (the aggregate amount of the four con-

*6 F. R. 2897, 2898; Press Release of June 14, 1941.

**The Superintendent contends that the contracts were cancelled, not suspended. The evidence is to the contrary. New contracts were not entered into (R. 122-123; 131-133; 406). The Superintendent has stipulated that the Bank's acts looking toward the performance of the transaction were carried out "pursuant to the contracts" in question (R. 503).

tracts) to Standard,* out of funds of the Bank which the Agency then held (R. 36; 371; 381 [182; 278]). There is no evidence whatever that at any time after June 14, 1941, the Bank sent, or attempted or intended to send any funds or credit to its New York Agency by reason of or for the purpose of carrying out this transaction; the proof is clearly to the contrary.

Extension of Foreign Funds Control to Japan

On July 26, 1941, Executive Order No. 8832 issued, amending Executive Order 8389 so as to include Japan and its nationals, effective as of June 14, 1941. Press Release No. 7, issued on the same date, stated in part:

> "This executive order, just as the order of June 14, 1941, is designed among other things to prevent the use of the financial facilities of the United States and trade between Japan and the United States in ways harmful to national defense and American interests, to prevent the liquidation in the United States of assets obtained by duress or conquest, and to curb subversive activities in the United States."

On the same day, July 26, 1941, the United States Treasury placed a national bank examiner, Cecil Ashwood (referred to in this brief as the Treasury Supervisor), and a corps of thirteen or fourteen assistants, in charge of the Bank's New York Agency, and they continued in charge

*The Bank at Yokohama debited Standard's account the amount, in yen, of the contract price of the dollars remitted on August 29, 1941 (R. 503).

until the declaration of war (R. 40; 294). Ashwood's supervision of the Agency covered all transactions of the Agency during the intervening period (R. 284). Ashwood informed the Agency's Japanese director that it could do no business except with his permission (R. 281). However, he permitted the Bank's representatives and employees at the Agency to inform remittees and payees of money and credit from abroad of the receipt of instructions from abroad to make the payments (R. 259, 260, 287).

Underlying Transaction in New York

On August 29, 1941, upon receipt of telegraphic instructions from the Bank's home office at Yokohama to pay Standard the $557,561.25 referred to above, the New York Agency's representatives, by telephone and letter, advised Standard's New York office of the receipt of such instructions, and it was agreed between them that Standard would apply to the Treasury for a license to permit the Agency to make the payment (R. 203).

The precise form of the advice given to Standard in New York was as follows (Ex. 7, R. 358 [118-9]):

> "Gentlemen:
>
> "Referring to our telephone conversation of today, we wish to advise you that we have received telegraphic instructions from ou Yokohama Office to pay you the sum of $557,561.25.
>
> "We understand that you are filing an application with The Treasury Department of the U. S. A. for a License in order to permit us to make this payment to you.

"Awaiting your reply regarding this matter, we remain

"Yours very truly,

"THE YOKOHAMA SPECIE BANK, LTD.

"S. ARAKI

"p.p. Agent"

The Agency took no other action whatever except to advise Standard—for the purpose of enabling it to make out its application for a Treasury license (R. 208-12; 179-80) that any payment would be made from its account with Guaranty Trust Company of New York. Specifically, the Agency did not, either then or thereafter, make any entry in any of its books of account; it did not debit the account of its Yokohama office nor did it ever establish any credit, or appropriate, set aside, earmark or transfer any account, fund or property to or for Standard or plaintiff (R. 36; 37; 44; 191-194; 266; 358 [118-119]).

Standard immediately filed with the Treasury its application (R. 417-23) for a license authorizing:

(a) the Bank to pay to Standard, and Standard to receive from the Bank, the sum of $557,561.25;

(b) Standard to credit on its books in New York the account which it maintained in the name of Standard's Yokohama office;

(c) Guaranty Trust Company to make payment and to debit the account on its books in the name of the Bank's New York Agency; and

(d) the Bank's New York Agency to debit on its books the account which it maintained in the name of the Bank's Yokohama office.

On October 15, 1941, Standard was notified by the Federal Reserve Bank that "the transaction in which you propose to engage" involved a question of policy which was receiving consideration by the Treasury Department (R. 39; 424 [156]).

Liquidation of the Bank's New York Business and Property

On December 7, 1941, the Japanese attacked Pearl Harbor. On December 8 war was declared. On that day (R. 40) the Superintendent took possession of the Bank's business and property in New York, for purposes of liquidation under Section 606(4) of the New York Banking Law, which provided that after payment of the claims of preferred creditors, together with interest thereon, and the expenses of the liquidation, the Superintendent was, upon order of the Supreme Court, to turn over the remaining assets to the Bank's principal office or to its duly appointed domiciliary liquidator or receiver.

On December 29, 1941, Standard filed with the Treasury a supplemental application for a license, which set forth the change in circumstances brought about by the liquidation proceeding (R. 494). On January 13 and 14, 1942, letters were addressed to Standard advising that its original and supplemental applications for a license had been denied (R. 40-41). No reasons were assigned for such denial, but, contemporaneously therewith, on January 14, 1942, pursuant to an application made by the Superintendent on January 5, 1942, the Treasury issued a general license to the Superintendent which authorized him, subject to certain stipulations, to make all payments appropriate to the orderly

liquidation of the Bank's business and property in New York in accordance with the laws of New York (R. 375-77 [227-8]).

On February 9, 1942, the Treasury issued a further license (R. 480-482 [333]), authorizing all banking institutions in New York to transfer to the Superintendent as liquidator, any funds or credits standing in the name or held for the account of, or belonging to the head office or any branch or agency of the Bank and also authorizing any banking institution, wherever located, to transfer to him as such liquidator, any funds or credit balances standing in the name or held for the account of its New York agency.

On December 18, 1941, the Congress enacted the First War Powers Act (55 Stat. 839), which amended the Trading with the Enemy Act so as to confer upon the President substantially enlarged powers in respect of the control of foreign funds and thereafter, on April 21, 1942, there was issued General Ruling No. 12 relating generally to unlicensed transactions affecting money or property in blocked accounts. General Ruling No. 12 contains provisions purporting to invalidate any "transfer" of any property in a blocked account after the effective date of Executive Order 8389 and defines "transfer" in such a way as to include substantially any action of any kind that may be taken with reference to property (par. 5a). It also, however, provides for retroactive licensing of a transfer covered by the General Ruling (par. 3) and for the treatment of such transfers, involved in litigation, as valid and enforceable for the purpose of determining for the parties to the litigation the rights and liabilities being litigated (par. 4).

Executive Order 9095, issued March 11, 1942, created the Office of Alien Property Custodian and empowered the

Custodian to vest property in the United States owned or controlled by enemy nationals. With reference to property being administered under judicial supervision, that Order provided for the vesting by the Custodian of

> "any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof."

On September 28, 1942, the Alien Property Custodian, by Supervisory Order 27 (R. 482-4 [333]), assumed supervision of the liquidation of the Bank's business and property in New York, and by letter dated the same day (R. 378-9 [228]) advised the Superintendent that it was contemplated that he (the Superintendent) "continue to retain possession of and liquidate such business enterprise, its property and assets, and in the course thereof you may do such acts and perform such duties as may be required of or permitted to you by" the New York Banking Law, but directed the Superintendent to notify the Custodian, in advance, of all claims which he intended to accept.

On October 29, 1942, the Treasury, by letter (R. 380 [228-9]), advised the Superintendent that, in view of the Custodian's issuance of the Supervisory Order, he (the Superintendent) might thereafter, so far as Executive Order 8389 was concerned, "engage in any transaction * * * which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country", and suggested that he consult the Custodian "concerning the applicability to your enterprise

of any orders, rulings or regulations of said office." This action was taken by the Custodian and the Treasury pursuant to Executive Order 9193. Paragraph 2 of that Order provides:

> "When the Alien Property Custodian determines to exercise any power and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of such property, except as authorized or directed by the Alien Property Custodian."

On February 15, 1943, the Alien Property Custodian issued Vesting Order No. 915 (R. 485-488 [383]). By that Order he administratively determined that:

> "The excess proceeds of the business and property in the State of New York of the Yokohama Specie Bank, Ltd., in the possession of the Superintendent of Banks * * * remaining after the payment of the claims of the creditors, accepted or established in accordance with the Banking Law of the State of New York, arising out of transactions had by them with the New York agencies of said The Yokohama Specie Bank, Ltd., or whose names appear as creditors on the books of such agency, together with interest on such claims and the expenses of liquidation"*

was property owned or controlled by, and payable to a Japanese national, and those excess proceeds he vested. The Order expressly authorized the Superintendent of Banks

*This quoted language paraphrases the language of section 606, subd. 4 of the New York Banking Law as it stood before the 1946 amendment.

> "* * * to continue to retain possession of, collect and liquidate such business, property and assets and in the course thereof, to do such acts and perform such duties (not inconsistent herewith) as may be required or permitted to said Superintendent of Banks by and in accordance with and subject to the provisions of the Banking Law of the State of New York; * * *"

and directed the Superintendent to pay to the Custodian the balance remaining after such liquidation should be concluded.

So far as the Record discloses, the last action taken by the Treasury with respect to the liquidation by the Superintendent of the business and property of the Bank in New York is the Treasury's letter of October 29, 1942, and the last such action taken by the Alien Property Custodian is his Vesting Order of February 15, 1943.

The Judgment Under Review

Upon the facts stated above, the New York courts have adjudged and determined that plaintiff is a creditor of the Bank in the sum of $557,561.25; that his claim arose out of a transaction with the Bank's New York Agency within the meaning of section 606(4) of the New York Banking Law;* and that—subject to the provisions of Executive

*As the Court of Appeals said in its opinion upon the first appeal (293 N. Y., at p. 550):

> "Our conclusion is that the course of dealing which culminated in the advice to Standard by Yokohama Specie's New York Agency, given in accord with instructions from its home office in Japan, was a *transaction* had by a creditor (Standard) of a foreign corporation (Yokohama Specie) with its New York agency, within the provisions of section 606, subdivision 4, paragraph (a) of the Banking Law. . . ." (Italics in the original.)

Order 8389 as to payment—plaintiff recover that sum from the Superintendent, as liquidator of the Bank's business and property in New York, out of the assets of the Bank, in his possession (R. 588-91; see also R. 541-2; 90-91).

Specification of Errors

The court below erred in deciding

(1) that payment of plaintiff's claim is now subject to the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto; and

(2) that plaintiff is not entitled to recover interest on the principal amount of his claim.

ARGUMENT

POINT I

NONE OF THE TRANSACTIONS UNDERLYING PLAINTIFF'S CLAIM WAS PROHIBITED BY THE PROVISIONS OF EXECUTIVE ORDER NO. 8389, AS AMENDED, OR BY ANY APPLICABLE RULE OR REGULATION ISSUED THEREUNDER.

On this basic issue in the case, the scope of the inquiry is relatively narrow. The question to be decided is simply this: In the course of the dealings between Standard and the Bank which created the Bank's indebtedness to Standard and which established plaintiff's status as a preferred creditor of the Bank under the New York Banking Law, was any act performed, either by the Bank or by Standard, which was violative of the applicable provisions of Executive Order No. 8389, as amended? If there was not, then the absence of a license specifically authorizing any of the transactions underlying plaintiff's claim can have no possible significance in this case. And, while the Superintendent's claim of violation of the provisions of the Order is here asserted only for the purpose of defeating plaintiff's recovery in a civil proceeding, it may not be inappropriate to point out that violations of the provisions of the Order are subject to penal sanctions as well (Sec. 8) and, accordingly, the prohibitory provisions of the Order must be construed in the light of that fact.

A

The Validity and Effect of the Transactions underlying the Claim are to be Determined by the Provisions of the Executive Order and the Rules and Regulations which were in Effect when those Transactions Occurred.

In this action we are concerned with the transactions, or groups of transactions, which—for present purposes—occurred in two distinct periods. First are the transactions underlying the claim. They were peace-time transactions; all of them occurred months before the outbreak of war, the enactment of the First War Powers Act, the development of a war-time policy affecting foreign funds, or the orders, rules and regulations which were based upon, and resulted from them—notably, General Ruling 12. Second are the transactions involved in, or relating to the liquidation of the Bank's business and property in New York including the issuance of the federal licenses under which such liquidation was carried out, and the bringing and adjudication of this litigation. All those transactions were carried on after the declaration of war, and war-time legislation and policy and the rules and regulations issued during the war period—including General Ruling 12—are controlling upon them.

At the time of the occurrence of the transactions underlying the claim, the authority of the President over foreign funds and property and transactions therein was conferred, defined and limited by section 5(b) of the Trading with the Enemy Act as last amended by the Joint Resolution of May 7, 1940 (54 Stat. 179). It authorized him to regulate or prohibit under such rules and regulations as he might prescribe:

". . . any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, . . . and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; . . ."

It will be observed of this statute, first that it limited the authority of the President to transactions by persons within United States territory, and second, that the power to define terms used by the statute (and so, arguably, to bring a typical situation within his control by definition) was limited—at least so far as the language of the statute was concerned—to defining banking institutions, and foreign states or nationals or political subdivisions thereof. So far as *transactions* placed within his control are concerned, there is in the statute no evidence whatever that Congress intended to authorize him to exercise control over any situation or state of facts not covered by the words of the statute, as reasonably and normally interpreted.

The Joint Resolution expressly ratified Executive Order 8389 in its then form.* On July 26, 1941, when transactions involving Japan and its nationals were brought within the control of that Executive Order, Section 1 thereof prohibited, unless licensed, the following transactions, if they (i) were by or on behalf of or pursuant to the direction

*The Executive Order in its then form (5 F. R. 1400) placed under control transactions described in the Order of June 14, 1941 (Executive Order No. 8785; 6 F. R. 2897), quoted *supra*. It contained definitions of "Norway", "Denmark", "national" and "banking institution".

of Japan or a national of Japan; or (ii) involved property of Japan or a national of Japan:

"A. All *transfers of credit* between any banking institutions *within the United States;* and all transfers of credit between any banking institution *within the United States* and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

"B. All *payments* by or to any banking institution *within the United States;*

"C. All *transactions in foreign exchange* by any person *within the United States;*

"D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person *within the United States;*

"E. All transfers, withdrawals or exportations of, or *dealings in, any evidences of indebtedness* or evidences of ownership of property by any person *within the United States;* and

"F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions." (Emphasis supplied).

Thus the Order, like the statute, placed under control only transactions within the United States. And it contained only one definition bearing upon the meaning of the expression "transaction"— a definition relating wholly to payments to foreign nations or nationals, the export or withdrawal of money or credit from the United States, and

transfers of credit or the payment of obligations expressed in terms of the currency of foreign countries.* That definition fell well within the words of the statute describing controllable transactions.

In applying the provisions of this statute and of this Order to the transactions underlying the claim, two principles of construction are apposite:

First, unless a contrary intent is expressed, legislation enacted by Congress will be construed as applying only within United States territory: *United States* v. *Spelar*, 338 U. S. 217, 222; *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285. As the Court said in the latter case:

> ". . . The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, *Blackmer* v. *United States*, *supra*, at 437, is a valid approach whereby unexpressed congressional intent may be ascertained . . ."

In this case, both the provisions of the statute and the Executive Order and the principles applicable to the construction thereof limit the impact of the Executive Order to acts and transactions which took place within the United

---

*The provision, contained in Section 5, is as follows:

> "A. As used in the first paragraph of section 1 of this Order 'transactions [which] involve property in which any foreign country designated in this Order, or any national thereof, has . . . any interest of any nature whatsoever, direct or indirect,' shall include, but not by way of limitation (i) any payment or transfer to any such foreign country or national thereof, (ii) any export or withdrawal from the United States to such foreign country, and (iii) any transfer of credit or payment of an obligation, expressed in terms of the currency of such foreign country."

States, and exclude therefrom acts and transactions which took place in Japan.

Second, the words of the statute, defining the transactions placed within the President's control, and likewise the words of the Executive Order imposing and exercising such control, must be given their usual and normal meaning: *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617; *Rosenman* v. *United States*, 323 U. S. 658, 661; *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 531. To give to such words a meaning substantially broader than they can have conveyed to the members of Congress who enacted the legislation is not to carry out the intent of Congress but to defeat it. As this Court said in *Jones* v. *Liberty Glass Co.* (*supra*, 332 U. S., at p. 531):

> "In the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used. . . .";

and as the Court said in *Rosenman* v. *United States* (*supra*, 323 U. S., at p. 661):

> ". . . On the face of it, this requirement is couched in ordinary English, and, since no extraneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey. . . ."

With the declaration of war and the enactment of the First War Powers Act the powers of the President over foreign funds and credits and transactions relating to them were greatly extended. On April 21, 1942, the Treasury's General Ruling 12 was promulgated. Utilizing new powers conferred by that Act, and largely by means of a paragraph

(5a) which defined transfers—"for purposes of this General Ruling"—in the broadest terms, it brought within the scope of freezing control a wide variety of transactions which, because occurring outside United States territory, or because they were not of the kind described in Section 1 of the Executive Order, had not theretofore been subject to such control.

Neither the First War Powers Act nor General Ruling 12 should be applied, retroactively, to invalidate the closed transactions underlying this claim, or to divest rights which had lawfully accrued thereon during the prior period of non-hostility.* The Act is not retroactive upon its face; its provisions do not either expressly or by clear implication apply to past transactions, nor do they authorize the President to regulate them or to control or determine their legal effect. As this Court said in *Claridge Apartments* v. *Commissioner of Internal Revenue*, 323 U. S. 141, 164:

> "* * * Retroactivity, even when permissible, is not favored, except upon the clearest mandate. It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed."

And as the Court said in *Haggar Co.* v. *Helvering*, 308 U. S. 389, 400:

Claridge Apartments v. *Commissioner of Internal Revenue*, 323 U. S. 141; *United States Fidelity Co.* v. *United States for the Use and Benefit of Struthers, Wells Co.*, 209 U. S. 306, 314; *United States* v. *St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1, 3; *United States* v. *Magnolia Co.*, 276 U. S. 160, 162. The retroactive application of a statute is not favored except in aid of some then-existing law or right: *Woods* v. *Stone*, 333 U. S. 472; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194; *Addison* v. *Holly Hill Co.*, 322 U. S. 607.

> "... Retroactive declarations of legislative intent, prejudicial to those who have acted under an earlier statute whose construction seems clear, it would seem, ought not to be implied more than the legislative intention to give retroactive operation to a new statute.* See *Hassett* v. *Welch*, 303 U. S. 303, 314 and cases cited; cf. *Noble* v. *Oklahoma City*, *supra*."

This Court has pointed out the non-applicability of General Ruling No. 12 to transactions which antedated its issuance. In *Propper* v. *Clark*, it said concerning the General Ruling (337 U. S., at pp. 485-6):

> "* * * General Ruling No. 12, as it came after the suit by the receiver against ASCAP was started and after the order appointing petitioner as permanent receiver, is not treated by us as decisive in this case. It is useful only as a statement of the administrative determination as to the effect of litigation without a license."

Thus transactions (including those underlying this claim) which—either because of their character or by reason of the place of their occurrence—were not subject to freezing control at the time they occurred cannot be transformed, *ex post facto*, into violations of law. All other objections aside, the President could not exercise authority over them—to invalidate them or otherwise—unless Congress gave him that power. And Congress did not, either by the First War Powers Act or by subsequent legislation—give to the President, or to the Treasury, any power

---

*The same, we submit, must be true of retroactive administrative "constructions" of prior administrative orders by means of such "definitions" of terms as are found in General Ruling 12.

over transactions which antedated the enactment of that legislation.

B

Although the Forward Foreign Exchange Contracts Between Standard and the Bank Contemplated Transactions Which, If Carried Out, Would Have Been Subject to Licensing Requirements under the Executive Order, None of the Transactions that Actually Took Place Was Subject To Such Licensing Requirements.

As has been shown in our statement of facts, this claim arises out of four forward foreign exchange contracts, executed by Standard and the Bank at Yokohama, prior to freezing, but *unperformed* by the Bank. Each of those contracts was performed by Standard, prior to the war, by payment to the Bank of the agreed price (in yen) of the dollars so purchased; each was performable (though not performed) by the Bank by payment to Standard, at New York, of the sum in dollars specified in the contract.

The contracts themselves were not licensable at their point of origin—Japan. They originated prior to freezing. And at the time of their performance, in Japan, by Standard, and of the carrying out by the Bank, in Japan, of acts looking toward their performance, transactions outside United States territory were not within the area of control conferred upon the President by section 5(b) of the Trading with the Enemy Act in its then form, nor are they, nor have they ever been, within the area of control imposed by the relevant provisions of the Executive Order itself. This we have pointed out.

The only *act* within United States territory called for by the underlying contracts was *payment* to Standard.

Doubtless, if payment had taken place, it would have resulted in a transfer of credit by the Agency in New York, or might have, in some sense, made the Agency a participant in the underlying foreign exchange transaction in Japan; but such transfer or participation, arising solely as a consequence of the act of payment, could not occur until payment occurred—still a future and a contingent event. Further, under the practice prevailing at the Agency prior to freezing, payment of the funds remitted from abroad actually preceded the making of any debit or credit entries to the accounts of any of the parties, including the account on the books of the Agency in the name of the Bank's Yokohama office (R. 270-1; 242-52). In this case, as has been pointed out, no such entries have been made; neither Standard's nor plaintiff's name has ever appeared upon the Agency's records as a creditor, or as the owner of an account payable (R. 37, 44).

The Court of Appeals has determined, and the judgment appealed from provides, that *payment* to Standard is subject to the provisions of the Executive Order. The Court has thus applied the provisions of the Order to the overall transactions *at the earliest point or stage of their development* which, either under the provisions of the Trading with the Enemy Act or within the language of the Order itself, was under the control of the Order.* Under the

*The Superintendent's brief lays great emphasis upon statements in both opinions of the Court of Appeals that this claim arises out of a transaction which was subject to license requirements. But the Court was there speaking of contemplated transactions—the attempted transmittal of funds from Standard at Yokohama, through the Bank, to Standard at New York. It was not holding that some act which had occurred should have been licensed. It pointed out in both opinions (R. 529, 533) that: "Any payment of funds by Yokohama Specie's New York Agency to Standard *as an incident to such transaction* is subject to the provisions of Executive Order No. 8389, as amended" (293 N. Y. *supra*, at p. 550, italics ours).

law, the Court of Appeals could not have ruled that acts in Japan required Treasury clearance, and upon the facts of this case, any application of the Executive Order to the over-all transactions at any stage prior to payment would, of necessity, have involved and rested upon such a ruling.

Of the transactions that actually took place—as distinguished from contemplated transactions—none was a licensable transaction. Those in Japan were not licensable for reasons stated. Those in New York were not licensable because there has been no transfer of funds or credit to the New York Agency and no transfer of credit or payment by the Agency. There has been only the Agency's advice to Standard that it had received instructions from abroad to make the payment, and would do so if payment was licensed by the Treasury. This, clearly, did not involve or imply an obligation to take any action in advance of the issuance of a license.* It did not involve the establishment of a credit as defined by this Court in *Propper* v. *Clark*.** Such a transaction does not fall within the language or purpose of any of the provisions of the Executive Order.

Manifestly, the contracts between Standard and the Bank *contemplated* the performance of transactions which, if carried out, would constitute transactions prohibited by (unless licensed under) the Order. That fact was recog-

*In the *Banque Mellie Iran* case the Court of Appeals said concerning the obligation of the Superintendent to make payment (299 N. Y., at pp. 144-5): "In the absence of Treasury authorization, the Superintendent was under no obligation, certainly under no absolute or unconditional obligation, to pay the principal of plaintiff's claim."

**In the *Propper* case this Court defined a credit as follows (337 U. S., at p. 480): "As 'credit' is not defined by the Order or regulation, we, in considering credits as property subject to vesting under the Trading with the Enemy Act, give it its ordinary meaning of the obligation due on accounting between parties to transactions."

nized by Standard in its application (R. 417-23) for a Treasury license authorizing:

> (a) the Bank's New York Agency to pay to Standard, and Standard to receive from the Agency, the sum of $557,561.25;
>
> (b) Standard to credit on its books in New York the account which it there maintained in the name of its Yokohama office;
>
> (c) Guaranty Trust Company to make payment and to debit the account on its books in the name of the Bank's New York Agency; and
>
> (d) the Bank's New York Agency to debit on its books the account which it maintained in the name of the Bank's Yokohama office.

But those *contemplated* transactions had not yet taken place; at the time of the application for the license, they were purely prospective transactions which would take place, if at all, only upon the granting of a license. Indeed, that the licensable transactions were prospective and not actual transactions was recognized by the Treasury in its letter of October 15, 1941, in which it was stated that a question of basic policy was involved in "the transaction in which you propose to engage" (R. 424).

The contemplated payment by the Bank's New York Agency to Standard would, of course, have been a licensable transaction. It did not take place. Furthermore, in view of the liquidation of the Bank's business and property in New York, it never will take place. The only payment transaction now in contemplation is a payment, not by the Bank's New York Agency, but a payment by the Superintendent.

The contemplated intra-office transfer of credit by entries on the books of Standard in New York was also a licensable transaction. That transaction did subsequently take place—but it was specifically licensed by the Treasury (R. 410-11, 440-3).

The contemplated payment by Guaranty Trust Company and the contemplated transfer of credit on its books would also have been licensable transactions. Those transactions, however, never took place and, in view of the liquidation, never will take place.

Lastly, the contemplated transfer of credit on the books of the New York Agency would have been a licensable transaction. That transaction, similarly, never took place and, because of the liquidation, never will take place.

The Superintendent, in his argument upon this point, apparently is unable to recognize the distinction between transactions which have taken place and those which have not taken place.

Basing his argument largely upon language taken from the first opinion of the Court of Appeals, when neither the findings of fact nor the evidence were before it, he argues that the transactions upon which the claim rests "contemplated" a transfer of credit between banking institutions within the meaning of Section 1 A of the Executive Order, and "involved" a transaction in foreign exchange by persons within the United States (Standard and the New York Agency) in alleged violation of Section 1 C; payments to the Agency by the Bank at Yokohama, and by the Agency to Standard in alleged violation of Section 1 B; dealings in evidences of indebtedness (a credit upon the books of the Agency) in alleged violation of Section 1 E;* and the

*Superintendent's Brief, pp. 17-18; 13.

creation of an interest in blocked property (the property of the Agency, and a part of the blocked account of the Yokohama Bank upon the Agency's books), in alleged violation of General Ruling 12.*

The charge (if it is so intended) that the New York Agency actually participated in any such transaction is disproven not only by the findings and the evidence, but actually by statements in the Superintendent's brief itself. He there states that:

> "The claim asserted by plaintiff in this action is based upon an *attempted* remittance of funds from Japan to New York on August 29, 1941." (Supt's. Brief, p. 5, italics ours).

He states that on August 29, 1941, the Bank telegraphed to the Agency to make the payment:

> ". . . thereby authorizing the Agency, *upon making the payment*, to debit the amount thereof against the dollar account maintained by the Yokohama office of the bank with the Agency." (Supt's. Brief, p. 6, italics ours)

He states that a Treasury license, and consent of the Treasury Supervisor:

> ". . . *were required before the Agency could enter into transactions covered by the Order.* . . .
>
> "Accordingly the Agency neither debited the account of its Yokohama office nor made payment to Standard of the sum specified in the cable of August 29, 1941, but instead advised Standard orally and in writing that the instructions had been received and that upon issuance of a license payment would be made." (Supt's. Brief, pp. 6-7, italics ours)

*Superintendent's Brief, p. 19.

And he states that:

> "... No entry was ever made on any of the books of the Agency with respect to the transaction ... and payment was never effected." (Supt's. Brief, p. 7)

Those concealed facts affirmatively establish that the Agency did not engage in any transaction falling within the terms or intended scope of the Executive Order.

C

The Transactions Did Not Involve the Creation of an Interest in Blocked Property, within the Meaning of the Executive Order.

The Superintendent's final contention respecting the transactions, underlying the claim, in which the New York Agency participated, is that they involved the creation of an interest in blocked property contrary to the construction which General Ruling 12 places upon the Executive Order and to the construction which this Court placed upon the Executive Order in *Propper* v. *Clark* 337 U. S. 472 (Supt's. Brief, p. 19). They did not involve the creation of any interest in property, within either the contemplation of the Executive Order or the construction which this Court placed upon the Order in the *Propper* case. For reasons stated, the meaning of the Executive Order, in so far as it relates to these transactions, is not affected by General Ruling 12.

The Executive Order, in Section 1, forbids various types of transactions—transfers of credit, payments, transactions in foreign exchange and the like. The transaction involved in the *Propper* case was an alleged transfer of title

to blocked property from an Austrian corporation to a receiver appointed under Section 977(b) of the New York Civil Practice Act. The Austrian corporation (AKM), prior to June, 1941, had among its assets a debt owed to it by the American Society of Composers, Authors and Publishers (ASCAP) for royalties under copyrights for the performance of musical compositions. On June 14, 1941 Executive Order No. 8785 extended to Austria the provisions of Executive Order No. 8389, thereby freezing (blocking) all assets here of Austrian nationals (including the ASCAP debt to AKM). On September 29, 1941, Propper, who, under § 977(b) of the New York Civil Practice Act, had previously been appointed temporary receiver of the assets in New York of AKM, was appointed permanent receiver of such assets. Such appointment as permanent receiver would have vested in Propper all right, title and interest of AKM in its claim against ASCAP if the freezing order of June 14, 1941 had not intervened. The question of the effect of the freezing order upon the validity of the transfer of title contemplated by the appointment of a permanent receiver under CPA § 977(b) was presented by an action instituted by the Alien Property Custodian to establish that, by reason of a Vesting Order (No. 2097) executed on September 4, 1943, he, rather than Propper, had title to the AKM claim against ASCAP. If, notwithstanding the earlier freezing order, title to the blocked property had been transferred to Propper by reason of his appointment as permanent receiver under § 977(b), the AKM claim against ASCAP would not have remained the property of AKM and, consequently, the Custodian's Vesting Order could not have reached such claim. The question presented,

therefore, was the effect of the freezing order upon a subsequent purported transfer of *title* to the blocked property.

This Court, affirming the decisions of the lower courts, held that Executive Order No. 8389, as extended to blocked property belonging to Austrian nationals, prohibited any unlicensed transfer of title to that property, the Court stating (337 U. S. at p. 486):

> ". . . We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this. The language of the order prohibits more than payment. It prohibits transfers of credit."

The other federal decisions relied upon by the Superintendent (Brief, p. 14) hold to the same effect: title to blocked property cannot be transferred without a license, because such transfer of title constitutes a transfer of credit prohibited by the Order.

But none of the transactions underlying plaintiff's claim in the present case purports to be a transfer of title to blocked property.* Consequently, the holding of this Court in the *Propper* case that a transfer of title was a transfer of credit within the meaning of the Order does not have any application to the present case. Neither the language of the Executive Order nor said decision of this Court construing such language, states or implies that a transaction which, at the time when it occurred, was not

---

*Accordingly, there is no basis in fact for the assumption made by this Court in the *Propper* case in its statement (337 U. S. at p. 484) that

> ". . . We assume that the Court of Appeals of New York held in *Singer* v. *Yokohama Specie Bank* that title to blocked assets could pass without license from a statutory receiver to a creditor."

the kind of a transaction which the Order describes—a transfer of credit, a payment, etc.—might at some future date be retroactively morphosed into such a transaction (and thereby retroactively rendered licensable and unlawful) because rights, which were neither involved at the time nor anticipated by the parties, were (at such future date) grounded upon it.

The Superintendent lays great stress upon a statement by the Court of Appeals that the transactions in which the Agency engaged: "served to create an enforceable legal obligation by the New York Agency to make such payment." The argument overlooks both the nature of the obligation and the relation of the Agency to the Bank. The obligation, as evidenced by the Agency's advice to Standard (R. 358), was simply to make the payment *if licensed*. There can be no question that, under the law and in view of Standard's contracts with the Bank, the Bank was under such an obligation, regardless of its letter of advice. Certainly its written acknowledgment of that plain fact—representative of an *existing* obligation—was neither a transfer of an interest in property nor a transaction of the kind described in Section 1 of the Executive Order. Under New York law, the Bank (including all its branches) was a *single debtor*. That point was squarely presented and decided in *Matter of Goebel*, 295 N. Y. 73.

The Court's decision in the *Banque Mellie Iran* case throws further light upon the nature, under New York law, of such a letter of advice. That letter was identical in substance with the one at bar. The Court said (299 N. Y., at p. 144) that by it the New York Agency: "*acknowledged*" that the funds therein referred to "were due to plaintiff *upon its obtaining Treasury authorization*," and that, therefore, the dealings which culminated in the

letter were a transaction with the Agency, within the meaning of the Banking Law. On the other hand, referring to another claim upon which no advice had been sent, it said that: "There is entirely lacking, as to those sums, *the essential acknowledgment* by the New York Agency, that it was under *any* obligation to pay plaintiff."

Evidently, then, an *acknowledgment* of the plain fact—then and theretofore existing by reason of underlying dealings—that the Agency was under obligation to make a payment *if licensed*, meets the requirements of the New York law. Thus as to this point, the Superintendent's argument must be tha ach an acknowledgment—unsupported by any further action by the Agency—was a transfer of credit, a payment, a transaction in foreign exchange, or a dealing in evidences of indebtedness, within the meaning of the Executive Order. Further, his argument must be that such acknowledgment, though given with the authorization of the Treasury's Supervisor, is unlawful under the Executive Order. We submit that both arguments are untenable.

D

The Superintendent's Construction of the Order is in Conflict with Provisions of Section 7 (b) of the Trading with the Enemy Act.

The Superintendent's attack upon the plaintiff's claim is based upon the provisions of Executive Order 8389. His contention is that the Executive Order defeats the claim by nullifying the transaction out of which the claim arose. Whether the Order had that effect depends not only upon its own provisions but also, and primarily, upon the provisions of the Trading with the Enemy Act, under which it was promulgated. If Order and Act conflict, the Act

(unless in some manner repealed by implication) must prevail.

Section 7(b) of the Trading with the Enemy Act contains the following provision:

> "Nothing in this Act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States not an enemy or ally of enemy, if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: *Provided*, That such payment shall not be made without the license of the President, general or special, as provided in this Act."

This provision was a part of the Act, as originally enacted in 1917. It was not, however, a part of the bill as originally introduced in Congress, but was added thereto as an amendment, accepted in the first instance by the Committee on Commerce of the Senate, following hearings on the bill by a subcommittee thereof. As originally submitted to the subcommittee, the proposed amendment was identical in language with the statutory provision as enacted except in one respect: it did not contain the provision requiring a Presidential license to permit payment.

The amendment was opposed, on behalf of the Government, by Assistant Attorney General Warren. He stated to the subcommittee, with reference thereto:*

*Minutes of Hearings before the subcommittee of the Senate Committee on Commerce, 65th Congress, 1st Session, held July 23, 24, 25, 27 and 30 and August 2, 1917, on H.R. 4960, at page 186. Minutes of the hearings were distributed to the entire Committee.

> "Now, the result of that will be that if any German had funds here, received prior to the beginning of the war, and the German had made some arrangement prior to the war that payments out of them should be made to persons over here, such payments may continue to be made after the passage of this act. That would have the effect of removing from the control of the Government those funds; because if payment can be lawfully made out of them, of course the Government would not be able to take them over."

Thus the meaning and the effect of the provision were made perfectly clear; it would validate instructions by an alien enemy to make payment of funds (subject to license for payment) if, first, the instructions were given prior to war, and second, the funds from which payment was to be made were in the United States prior to war, and third, the payee was within the United States, and last, the payment arose out of a pre-war transaction. The claim at bar meets those requirements, point for point.

In spite of the objections so raised, the Committee, and later the Senate and Congress, adopted the amendment, subject only to the requirement that payment should not be made without a license from the President. The Committee on Commerce, in its Report to the Senate, said:*

> "Provision is also made for payment to American citizens out of German funds in this country where the funds were received prior to the war and the necessity for payment arises out of transactions entered into prior to the war, but such payments are to be made only with the license of the Secretary of Commerce." (Hearings, pp. 47-72)

*Senate Report No. 111, 65th Congress, 1st Session, p. 8; repeated verbatim, Senate Report No. 113, *idem*, p. 8.

The provisions of the enactment, as so interpreted, fit exactly the facts of this case. Plaintiff and his assignor (Standard) are and were American residents and nationals. Payment was to have been made to Standard, at New York, out of funds held by the Agency, prior to the war. The contracts and all arrangements for payment were completed prior to war. They were not in contemplation of war. Indeed, the contracts antedate not only the Japanese War but also the period of unlimited national emergency and consequent freezing control which preceded it.* Under the judgment payment is conditioned upon compliance with the license requirements of the Executive Order.

It is, therefore, submitted that the transactions underlying plaintiff's claim not only were not, but, under Section 7(b) of the Trading with the Enemy Act, could not properly have been, subject to the license requirements of the Executive Order.

*It will be recalled that a similar period of unlimited national emergency preceded the First World War. Diplomatic relations with Germany terminated on February 3, 1917. War was declared on April 6, 1917 (The World Almanac, 1949).

POINT II

ASSUMING THAT NONE OF THE TRANSACTIONS UNDERLYING PLAINTIFF'S CLAIM WAS PROHIBITED BY THE ORDER, DOCUMENTS ISSUED TO THE SUPERINTENDENT BY THE TREASURY AND BY THE ALIEN PROPERTY CUSTODIAN AUTHORIZE PAYMENT OF SUCH CLAIM.

The Superintendent, in his brief to this Court opposing our application for certiorari (p. 10), said concerning the federal licenses which were issued to him as liquidator:

> "... Thereafter [after December 8, 1941] the Secretary of the Treasury and the Custodian issued certain documents authorizing the Superintendent in general terms to carry on the liquidation of the Agency and *to utilize its funds for the payment of claims entitled to share therein.* None of these documents purported, or was intended, to license the creation of new claims or validate transactions taking place before the liquidation commenced ..." (Matter in brackets and italics ours.)

That statement comes close to conceding—if in fact it does not concede—the correctness of our position upon this appeal. We do not contend that the documents in question license the creation of new claims, or validate invalid transactions. We do claim, however, that those documents authorize the Superintendent to pay all claims of creditors of the Bank which have been established, in accordance with the Banking Law, as arising out of transactions had by them with its New York Agency. This claim has been so established, and the judgment determines that it is such a claim. (R. 90, 91; 541; 588-91).

As has been stated, the Treasury issued four documents to the Superintendent: a preliminary license on December 19, 1941; a general license on January 14, 1942; a supplementary license on February 9, 1942; and a letter renouncing jurisdiction on October 29, 1942. The first and third licenses have no bearing upon the payment of claims of the character of the one in suit. Here we shall discuss only the January 14, 1942, license and the October 29, 1942, letter, and since the lower State courts allowed interest from the latter date we shall discuss that document first.

The October 29, 1942 letter contained a provision expressly authorizing the Superintendent (R. 380):

> ". . . so far as Executive Order No. 8389, as amended, is concerned, to engage in any transaction on or after October 29, 1942, which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country."

Payment by the Superintendent—an American state official holding title under federal license to funds formerly belonging to a Japanese bank—of a claim held valid and preferred under the New York Banking Law by a New York court, to an American claimant, clearly is a transaction which might be engaged in without a Treasury license. It falls squarely within the language of the letter.

Although relevant only to the question of plaintiff's right to interest upon the principal amount of his claim for a period of approximately nine months (i.e., from January 14, 1942 to October 29, 1942), the fact is that the Treasury had authorized payment of a class of claims which included plaintiff's claim by the license issued to the Superintendent

(R. 375) on January 14, 1942. The license states (R. 377):

> "You are hereby authorized to make payments to depositors, effect the sale of securities and delivery of collateral, make payments of salaries and other expenses and to perform all other acts appropriate to the orderly liquidation of the assets, property and business in the State of New York of the following Foreign Banking Corporations in accordance with the laws of the State of New York:
>
> ". . .
>
> "Yokohama Specie Bank, Limited. . . ."

The license required the Superintendent (1) to pay into blocked accounts in domestic banks all moneys due to enemy nations or nationals; (2) to obtain special licenses for all transactions involving blocked nationals other than "the bank in liquidation";* and (3) not to make payment to the bank's stockholders without a special license.

The superintendent, upon his application to this Court for certiorari, said concerning this license (p. 7):

> ". . . On January 14, 1942, he [the Superintendent] obtained a license authorizing him to liquidate the assets and pay the creditors of the agency, subject to the stipulation, among others, that transactions involving blocked nationals other than the agency could be effected only as authorized by a general or specific license [Ex. 15, R. 375 (228)]. . . ."

*This provision in its entirety is as follows:

> "2. Transactions involving a blocked national other than the bank in liquidation shall be effected only as authorized by a general or specific license."

That Statement reflects a basic disagreement between plaintiff and the Superintendent. The Superintendent's contention (reflected in his quoted construction of this license) is that he was empowered by the New York Banking Law, and was authorized by the federal licensing officials by documents which generally paraphrased that Law, to act as liquidator only of the New York Agency—which he regards as an institution separate from the Japanese Bank—and to pay only the creditors of the Agency. Applying that construction to this license, he contends that the Japanese Bank is "a blocked national other than the bank in liquidation" (i.e., the New York Agency), and that, therefore, although it authorizes payment of claims in general, it does not authorize payment of this claim.

If it had been the intention of the Treasury to authorize the Superintendent to act as liquidator only of the New York Agency it could readily have expressed that meaning. It did not do so, but on the contrary, authorized the Superintendent to liquidate the business and property: "of the following *Foreign Banking Corporations* in accordance with the laws of the State of New York", and then named: "Yokohama Specie Bank, Limited". The license never referred to the New York Agency, nor to the agencies or branches of any of the foreign banking corporations which it names.

Further, a license to liquidate the Agency or to pay the Agency's creditors would not have been "in accordance with" the New York Banking Law, and could not have been exercised under its provisions. Section 606(4) of the Banking Law authorizes the Superintendent to: "take possession of the business and property in this state of any *foreign banking corporation*, which has been licensed by

him" under the Banking Law, where facts warranting it exist, and to: "liquidate the business and property of any such *foreign banking corporation*" in accordance with the provisions of that Law; it does not provide for the liquidation of an agency. Further, the Banking Law provides for payment of the claims, not of creditors of the New York Agency, but on the contrary, "of creditors of *such corporation* arising out of transactions had by them with its New York agency. . . ." Moreover, the judgments in this action declare that petitioner is a creditor of The Yokohama Specie Bank, Ltd., and they direct, expressly and repeatedly, that petitioner recover the amount of his claim from the Superintendent as liquidator of the business and property in New York of said Bank out of the Bank's assets in his possession (299 N. Y. 791; R. 90, 91; 589, 590). Those facts we have commented upon.

Finally, the Treasury itself, by its license of February 9, 1942, expressly recognized that the Superintendent was acting as liquidator of the New York business and property of the Bank as an entirety, and not merely of the New York Agency. By that license the Treasury authorized the Superintendent to authorize banking institutions in New York to transfer to him as liquidator:

> ". . . of the business and property in New York of . . . Yokohama Specie Bank Limited . . . any funds or credit balances standing in the name of or belonging to or held for the account of *the head office or any other office, branch or agency* (including, without limitation, the New York Agency) of any such foreign banking corporation: . . ." (R. 480-1; italics ours)*

*The license names not only Yokohama Specie Bank, Ltd., but also names other Japanese or Italian banks which had agencies in New York.

The argument that the authority which the Treasury conferred or intended to confer upon the Superintendent of Banks was limited to the liquidation of the business and property of the New York Agency not only contradicts the clear and unrestricted provisions of its (the Treasury's) general liquidation license but also assumes that the Treasury by its supplementary license authorized the Superintendent to collect and use funds of the Bank's head office and other branches, to which, if he were liquidator only of the Agency under the New York Banking Law, he would have had no legal right whatever. Thus by every standard applicable to the construction of statutes and documents this license authorized payment of the claim in suit, as an act: "appropriate to the orderly liquidation of the assets, property and business in the State of New York . . . in accordance with the laws of the State of New York", of "Yokohama Specie Bank, Limited", and the clause restricting: "transactions involving a blocked national other than the bank in liquidation" is inapplicable.

Although the Superintendent has not asserted as a defense any act or omission of the Alien Property Custodian but has relied in so far as concerns the license defense, solely upon the alleged failure of the Secretary of the Treasury to issue a license permitting payment of plaintiff's claim (R. 19, 20), it may nevertheless be appropriate to point out that the documents issued by the Alien Property Custodian authorize payment of all claims entitled to payment under the New York Banking Law.

The Custodian assumed jurisdiction over the liquidation by his Supervisory Order No. 27, issued September 18, 1942 (R. 482), and by his letter to the Superintendent dated September 28, 1942 (R. 378). The Supervisory Order

contains no provisions relevant to the present point. The letter to the Superintendent, however, contains explicit instructions for the liquidation of the Bank's business and property in the Superintendent's possession. The Superintendent is directed: first, to continue the liquidation, pursuant to the Banking Law; second, to advise the Custodian of claims about to be accepted, to the end that the latter may "take whatever action he may deem necessary or advisable"; and third, to notify the Custodian when claims of the kind described in the Banking Law, together with interest and the expenses of the liquidation, have been paid.

The power of the Superintendent to continue the liquidation in conformity with the provisions of the Banking Law is expressly granted. The letter states (R. 378):

> "For the present, it is contemplated that you shall continue to retain possession of and liquidate such business enterprise, its property and assets, and in the course thereof *you may do such acts and perform such duties as may be required of* or permitted to *you by* and in accordance with and subject to the provisions of *the Banking Law of the State of New York*. . . ." (italics ours)

There can, of course, be no question that the payment of claims entitled under the Banking Law to preference and payment in the liquidation because arising out of transactions by creditors with the Bank's New York Agency are: "acts and . . . duties . . . required of or permitted to you [the Superintendent] by . . . the provisions of the Banking Law"* of New York, within the express terms and the clear intent of the letter.

*The Banking Law, section 606(4)(b) authorized the Superintendent to release the proceeds of the liquidation only when: "the

The letter recognizes that claims of creditors arising out of transactions with the Bank's New York Agency are entitled to payment in the course of the liquidation, and clearly contemplated that the Superintendent would pay such claims without special authorization. It states:

> "You are also requested to notify the undersigned when you have liquidated assets sufficient to produce funds necessary to pay, *and there have been paid*, all the accepted or established claims of *creditors whose claims arose out of transactions had by them with the New York branch of such business enterprise*, or whose names appear as creditors on the books of such branch, together with interest thereon. . . ." (italics ours)

The Superintendent's brief opposing our application for certiorari states (p. 9):

> ". . . In other words, the letter authorized the Superintendent to continue the liquidation and to pay the creditors entitled to be paid."

Among the creditors so entitled are those whose claims arose out of transactions with its New York Agency.

The Custodian's Vesting Order continued the power of the Superintendent to carry out the liquidation under the provisions of the Banking Law. It authorized him, substantially in the language of the September 28, 1942, letter (R. 487):

> ". . . to continue to retain possession of, collect and liquidate such business, property and assets and,

---

claims of such [preferred] creditors, together with interest thereon, and the expenses of the liquidation have been paid in full. . . ." Thus failure to license payment of such claims would have brought state and federal law into direct conflict.

in the course thereof, to do such acts and perform such duties (not inconsistent herewith) as may be required or permitted to said Superintendent of Banks by and in accordance with and subject to the provisions of the Banking Law of the State of New York; . . ."

As we have stated, the payment of plaintiff's claim, as a claim established under the Banking Law, was an act required of the Superintendent under that law.

The Vesting Order clearly contemplated that the Superintendent would continue the payment of claims entitled to payment under the Banking Law until all have been discharged. It states (R. 487):

". . . that *after the claims of the creditors described in subparagraph 4* hereof, together with interest thereon and the expenses of liquidation, *have been paid in full*, the proceeds of the remaining assets of said The Yokohama Specie Bank, Ltd. in the possession of said Superintendent of Banks shall be held for the account of and subject to the further order of the Alien Property Custodian." (italics ours)

The "claims of creditors described in paragraph 4" are in said paragraph described as (R. 486):

". . . *claims of the creditors*, accepted or established in accordance with the Banking Law of the State of New York, *arising out of transactions had by them with the New York agencies of said The Yokohama Specie Bank, Ltd.* or whose names appear as creditors on the books of such agency, together with interest on such claims. . . ." (italics ours)

As pointed out, the Superintendent concedes that the letter and the Vesting Order: "authorized the Superintendent . . . to pay the creditors entitled to be paid." There can be no question that, alike under those documents and under the Banking Law: "creditors whose claims arose out of transactions had by them with the New York branch of such business enterprise" were so entitled; such is the language both of the letter and of the Vesting Order. This is such a claim.

The foregoing documents issued by the Custodian are in conformity with the declared policy of the Custodian to authorize State authorities to liquidate enemy banking institutions in accordance with State law. See the Custodian's Reports for the Fiscal Years ending June 30, 1944 (pp. 58-59), June 30, 1945 (pp. 86-87) and June 30, 1946 (pp. 88-89).

The Custodian's Report for the Fiscal Year ending June 30, 1944, state. (pp. 58-59):

> *"Division of Liquidating Functions between State Authorities and the Custodian*
>
> "The regulation of banks and insurance companies is an activity of state governments, and it was determined that the liquidation of such enterprises should be accomplished in accordance with the laws of the states in which they are located, as far as practicable. Many of these vested companies were being liquidated by state authorities prior to the establishment of this Office."
>
> . . .
>
> *"Types of Vesting Used.*—In order not to interfere with the liquidation proceedings of the state authorities and to give effect to preferences for certain creditors allowed by state laws, the Custodian

> refrained from vesting the assets of the 17 branches being liquidated by State authorities. Instead he vested the excess assets of these companies remaining after payment of creditors preferred under state laws. . . ."

That Report refers, on the same page (p. 58), to "the Yokohama Specie Bank of New York", and to its liquidation by the Superintendent.

It thus appears, without the possibility of dispute, that the Custodian has authorized the payment of all claims, established in accordance with the Banking Law, arising out of a transaction by a creditor with the Bank's New York Agency. The judgments of the State courts establish that this is such a claim, and that it is valid under the State law. Its payment clearly is authorized.

POINT III

PAYMENT OF PLAINTIFF'S CLAIM BY THE SUPERINTENDENT IS NOT NOW SUBJECT TO EXECUTIVE ORDER NO. 8389, IN VIEW OF THE RELEASE BY THE SECRETARY OF THE TREASURY TO THE ALIEN PROPERTY CUSTODIAN OF CONTROL OVER THE LIQUIDATION, OF THE BANK'S BUSINESS AND PROPERTY IN NEW YORK.

Both decisions of the Court of Appeals state that the claim sued upon cannot be paid in the absence of a license from the United States Treasury, issued under Executive Order 8389, authorizing such payment. The judgment under review provides that payment of the claim: "is subject to the provisions of Executive Order No. 8389, as amended . . ." (R. 590). Executive Order No. 8389 provides only for the licensing of transactions by the Treasury.

Pre-war freezing control under Executive Order 8389 —as distinguished from war-time regulation of all communications with enemies or allies of enemies—was directed specifically and exclusively at the disposition of assets within the United States owned or controlled by designated foreign nationals. Such control clearly extended to all property of the Bank in the State of New York during the period from July 26, 1941 (the date on which the provisions of the Order were extended to Japan) to October 29, 1942 (the date on which the Secretary of the Treasury released control of such property to the Alien Property Custodian). The question here briefed is whether the disposition of such property after October 29, 1942 was subject in any respect to the provisions of Executive Order 8389.

As heretofore stated, on December 8, 1941, the Superintendent took over the Bank's business and property in

New York for the purpose of liquidation under the New York Banking Law. That Law provided that the claims of certain creditors "shall be preferred against the assets of such corporation in this state" and that "whenever the claims of such creditors, together with interest thereon . . . have been paid in full", the Superintendent should send the balance of the proceeds of such business and property to the foreign bank's home jurisdiction. Under the New York Banking Law, the effect of the Superintendent's taking possession of the Bank's property was to vest title to such property in the Superintendent for the purposes of liquidation under the statute. *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 280, 284. It is true, of course, that Executive Order 8389 was effective as to Japan and its nationals at the time of the transfer to the Superintendent. Unlike the situation presented in *Propper* v. *Clark*, however, the transfer to the Superintendent was specifically licensed by the Treasury. Thus on February 9, 1942, the Treasury issued a license authorizing banking institutions "to pay over, transmit or transfer to the Superintendent . . ., as liquidator of the business and property in New York of . . . Yokohama Specie Bank, Ltd. . . . any funds or credit balances" of the Bank (R. 480). The earlier licenses issued by the Treasury (December 19, 1941 and January 14, 1942) contained limitations affecting the Superintendent's disposition of the property taken over by him, but none of such limitations affected the taking by the Superintendent.

Accordingly, upon the creation of the Office of Alien Property Custodian on March 11, 1942 (Executive Order 9095) the status of the Bank's assets in New York as foreign-owned property had altered materially from what it had been in 1941. Under par. 2(f) of Executive Order 9095, the Custodian was authorized to vest

> "any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof."

Under that provision, the Custodian was empowered to vest such part of the property in the possession of the Superintendent as would be payable under the New York Banking Law to preferred creditors who are enemy nationals and also the excess proceeds remaining in the hands of the Superintendent as liquidator after payment of the preferred claims under the New York Banking Law (which excess proceeds the New York Banking Law made payable to the Bank at Japan).

It was the special function of the Alien Property Custodian to exercise jurisdiction over alien enemy banking and other business enterprises, including the dollar balances and other assets of such enterprises; and also, over any property in process of administration by any person acting under judicial supervision which was payable or deliverable to, or claimed by, a national of a designated enemy country (Executive Order 9193, section 2, paragraphs (a) and (f)). And after the creation of the office of Alien Property Custodian it continued to be the function of the Treasury to exercise jurisdiction over the dollar balances, bullion and securities of such nations and their nationals, except those which belonged to an enemy business. That division of jurisdiction and authority, as between the Custodian and the Treasury, was fixed and determined by the President not later than July 6, 1942, when he promulgated Executive Order 9193, amending Executive Order 9095. On that

date the following statement, explanatory of the Executive Order,* was issued by the White House:

> "The President has signed an executive order allocating powers and functions between the Alien Property Custodian and the Secretary of the Treasury with respect to property of enemy, neutral, and occupied countries and their nationals.
>
> "The Executive Order provides for the following division:
>
> "1. The Alien Property Custodian will handle:
>
> "(a) *Enemy-owned or controlled businesses* (including dummies) operating in the United States *and the dollar balances and other assets of such businesses.*
>
> * * * * * * * *
>
> "2. The Treasury will continue to handle:
>
> "(a) The dollar balances, bullion and securities of governments or nationals *except those which belong to an enemy business.* * * *" [Italics ours.]

As stated, the jurisdictional basis of that scheme of administration and division of authority is Executive Order 9193. The power which it granted to the Custodian was not merely a second and duplicatory power to freeze property. On the contrary, it was primarily a "power to direct, manage, supervise, control * * *: Any business enterprise in the United States * * *" (including its property) in

*Press Release No. 37; Documents Pertaining to Foreign Funds Control, issued by the Treasury, September 15, 1946, page 74.

either enemy-owned,* or in certain cases if foreign-owned. If the Treasury had retained control over such enterprises or their properties, a conflict—certainly in its scope and at least potentially in its exercise—would have existed between that retained power and the Custodian's power of direction, management and control over them. That conflict the Order avoids. Section 2, after describing the areas in the field of foreign property control over which the Custodian is authorized to exercise jurisdiction, provides:

> "When the Alien Property Custodian determines to exercise *any power* and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release *all control* of such property, except as authorized or directed by the Alien Property Custodian." [Italics ours].

Pursuant to the foregoing grant of power the Custodian, on September 28, issued his Supervisory Order No. 27, entitled: "Re; Yokohama Specie Bank, Ltd. [New York]", by which he assumed supervision of the "New York

*The Executive Order states:

"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

"(a) Any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;".

branch of said business enterprise", and of all property owned, controlled or held by it, or on its behalf. The Order was based upon the Custodian's finding: "That Yokohama Specie Bank, Ltd., * * * which has an established branch at New York * * * is a business enterprise within the United States which is a national of a designated enemy country [Japan]", and that it or its New York branch has or claims property which is in process of administration by the Superintendent, acting under judicial supervision by the New York Supreme Court (R. 482-4).

By that Supervisory Order, it is clear, the Alien Property Custodian exercised the power expressly vested in him by Executive Order 9193, "to * * * supervise * * *: Any business enterprise [the Japanese Bank]* within the United States which is a national of a designated enemy country and any property * * * owned or controlled by * * * such business enterprise * * *." Upon issuance of that Order, and upon due notification thereof, it became the duty of the Treasury to "release all control of such property * * *."**

Accordingly, on October 29, 1942, by letter, the Treasury advised the Superintendent that in view of the issuance of the Supervisory Order, so far as Executive Order 8389 was concerned, he might thereafter engage in any transaction which might be engaged in without a license by a per-

---

*Matter in brackets ours.

**The Superintendent, opposing our application for certiorari, argued (Br., p. 3) that: "the nature and extent of any release of control by the Secretary of the Treasury *in this case* is to be determined by the terms of the document supposedly effecting it." We do not assume that the Treasury's release of control was any narrower than the Executive Order required. In any event, the scope of the release is fixed by the law (Executive Order 9193), and not by the terms of the document by which the Treasury complied with the law.

son who was not a national of a blocked country; suggested that the Superintendent communicate with the Custodian concerning the applicability to "your enterprise" of any orders, regulations or rulings by the Custodian; and revoked its license, under which the Superintendent had been carrying on the liquidation. The United States, in its brief to the New York Court of Appeals in support of the Superintendent's application for leave to appeal to that Court, said (p. 17) that this letter "thus constituted the release called for by Section 2 of Executive Order No. 9193." And in its brief, as *amicus curiae*, to the Appellate Division of the New York Supreme Court, the United States described the letter (p. 26) as "a device for the *withdrawal* of the Treasury from the field on the occasion of the assumption of jurisdiction by the Alien Property Custodian."

The scheme of administration of enemy property thus established is perfectly clear. Two administrative authorities—the Treasury and the Alien Property Custodian—were designated and empowered to act. To each was given jurisdiction over certain blocked enterprises and properties and the claims pertaining to them. No duplication of authority, or of jurisdiction, was contemplated. No reason appears, or has been suggested, why there should have been such duplication; why, for example, the Treasury should have retained veto powers over the Custodian's decisions, or why separate, concurring, affirmative action by both the Treasury and the Custodian should have been necessary upon all claims.

Nor is there any doubt that the Custodian asserted and exercised authority to pass upon all claims affecting enemy business enterprises and their property over which he had

assumed jurisdiction or, specifically, that he did so in this liquidation.* As the Court of Appeals pointed out, the Custodian, by his letter accompanying Supervisory Order No. 27, required the Superintendent to submit to him, in advance, all claims which the Superintendent intended to accept. And as pointed out by the United States in its brief (p. 17) as *amicus curiae* to the Court of Appeals in support of the Superintendent's application for leave to appeal to that Court: "immediately upon the receipt of the [Treasury] release, the Custodian explicitly prohibited 'All transactions . . . by, or with, or on behalf of, or pursuant to the direction of, any business enterprise' of which he had undertaken supervision except as specifically authorized by the Custodian or his representatives," citing the Custodian's certificate of appointment of supervisors (7 F. R. 8910) and his General Order No. 31 (9 F. R. 7739). Such controls are substantially identical with controls imposed by the Treasury under Executive Order 8389. Thus, the Custodian's General Order No. 31 forbade, unless licensed by him or his subordinates, any transactions which involved any property, control of which had been released to him by the Treasury, or which were by, or with, or on behalf of, or pursuant to the direction of any business enterprise

*Thus the Superintendent argument, in opposition to our application for certiorari, that (Br., p. 3): "Section 12 of Executive Order No. 9193 deprives the plaintiff of the power to challenge the exercise by the Secretary of the Treasury of powers entrusted to the Custodian" is not in point. The Secretary of the Treasury took no action whatever after his renunciatory letter; there is no action of his for us to challenge. The question actually raised is whether the power, or jurisdiction, to take action continued to be delegated to him by the President, since if it was not, his failure to take action on this claim is without legal significance, and since this judgment should not have conditioned payment, or plaintiff's right to interest, upon the exercise by him of powers which are vested in others.

of which he had undertaken supervision, or of a business any of the assets of which he had vested.*

Thus there would result, under contentions advanced in the Court of Appeals by the Superintendent of Banks and by the United States, and which that Court accepted, a dual control, cumbersome in operation, unjustified by any disclosed or apparent administrative consideration, and wholly inconsistent with the "*release*" by the Treasury "of *all* control of such property." (Executive Order No. 9193).

No declaration, decision (other than the decision in this case) or pronouncement, either executive, administrative or judicial, can be cited in support of the contention that enemy business enterprises over which the Custodian had assumed jurisdiction, or that the property of such enterprises, were subject to dual control, by the Custodian and by the Treasury. All available source material and authority substantiates the opposite view.

Thus the Custodian, in his Annual Report for the Period March 11, 1942, to June 30, 1943 states (page 9):

> "In the case of property already subject to the 'freezing control' of the Secretary of the Treasury, provision was made for the release of control to the

*The Order forbade, unless so licensed:

"(1) All transactions involving any property, control of which has been released by the Secretary of the Treasury pursuant to Executive Order No. 9095, as amended, subject to the power and authority conferred upon the Alien Property Custodian; and

"(2) All transactions by, or with, or on behalf of, or pursuant to the direction of, any business enterprise of which the Alien Property Custodian has undertaken the supervision, or which he has vested, or assets of or interests in which he has vested, or involving any property in which such business enterprise has any interest, control of such property or business enterprise having been released by the Secretary of the Treasury pursuant to Executive Order No. 9095, as amended."

Custodian upon his determination to assume jurisdiction."

So likewise the Custodian, in his Report for the Fiscal Year ended June 30, 1944, states (pp. 2, 3):

"... Under section 2 of Executive Order No. 9193, the Alien Property Custodian has been assigned the function of handling enemy business enterprises, enemy patents and similar property. This order provides for the release of control of this property by the Secretary of the Treasury to the Custodian upon the Custodian's determination to assume jurisdiction.

"... When, upon request by the Alien Property Custodian, the Secretary of the Treasury releases to the Custodian control over an enemy business enterprise, or other productive property, he also releases to the Custodian control of any liquid assets pertaining to the productive property."

And in his Report for the Fiscal Year ended June 30, 1945, he states concerning Executive Order 9567, extending his vesting power under paragraph 2(c) of Executive Order 9193* (p. 4):

"... By and large, this Office now concentrates on vesting all of the property of nationals of Germany and of Japan. The Treasury Department on the other hand, controls in various degrees the property of nationals of all other countries, except property previously vested by the Custodian. In a few minor areas there remains a division of jurisdiction between this Office and the Treasury Department with respect to the property of persons other than nationals of Germany and Japan."

*Paragraph 2(c) of Executive Order 9193 relates to the Custodian's power to supervise, control, vest, etc., alien enemy property other than that owned by enemy business enterprises. Originally enemy cash, credit or securities could not be vested.

Thus the decision of the Court of Appeals that plaintiff's claim could not have been and cannot be paid without a specific license from the Treasury is tantamount to a decision that it could not have been and cannot be paid at all. No authority of any sort can be cited in support of that conclusion. Yet it cannot be avoided if the requirement for a Treasury license be read in the light of the provisions of Executive Order 9193 and the administrative construction placed upon it in the statements which we have quoted. But if there were otherwise any doubt upon the point it is set at rest by the Treasury's General Ruling No. 19.* That Ruling, after stating that all property of Germany or Japan, or their nationals, which has been vested by the Alien Property Custodian, is released to the Custodian, continues:

> ". . . A release of control over any vested property or interest to the Alien Property Custodian constitutes a final denial by the Secretary of the Treasury of any pending application for license or other authorization with respect to any such property or interest. No application for license or other authorization with respect to any such property or interest will thereafter be entertained or granted by the Secretary of the Treasury."

Thus it is clear that, at least since October 29, 1942, the Treasury has had no jurisdiction over the payment of claims filed with the Superintendent in this liquidation; that the right to payment of this claim is not subject to the provisions of Executive Order No 8389; and that the decision of the Court of Appeals to the contrary (R. 541-2; 590) is error.

---

*Issued December 6, 1945 (14775); amended August 2, 1946 (11 F. R. 8350; Documents Pertaining to Foreign Funds Control, pp. 28-29)

POINT IV

THE JUDGMENT UNDER REVIEW IS VALID AND ENFORCEABLE UNDER EXECUTIVE ORDER NO. 8389, AS SUPPLEMENTED BY GENERAL RULING 12.

The ultimate question presented by the Superintendent's appeal is whether the judgment sustaining the plaintiff's claim and directing its payment if licensed is valid, if it should be held that one or more of the transactions underlying plaintiff's claim was prohibited by (unless licensed under) Executive Order No. 8389 and that payment of such claim is now subject to the provisions of the Order. The New York Court of Appeals rested its decision of that question largely upon General Ruling 12* (7 F. R. 2991), which was promulgated "by direction of the President" on April 21, 1942, more than two years before the action was commenced, and more than five years before the judgment was rendered.

General Ruling 12 relates in its entirety to the effect, under Executive Order 8389, of licensable but unlicensed transfers. In paragraph 5(a)** it defines the term "trans-

---

*293 N. Y. at p. 550.

**Section 5(a) in its entirety is as follows:

"(a) The term 'transfer' shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or

fer" in terms so broad as to include every act or transaction which under any circumstances might be held to be licensable under Section 1 of the Executive Order. Transfers, as so defined, include:

> ". . . any actual or purported act or transaction, . . . the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, power, privilege, or interest with respect to any property. . . ."

It is indisputable that, if any act or transaction disclosed by the present record is held to be licensable under Section 1 of the Executive Order, the ground of such holding must necessarily be that such act or transaction was intended to or did surrender, release, transfer or alter, directly or indirectly, some right or interest with respect to property—either Standard's claim, or funds owned, directly or indirectly, by the Japanese Bank, or held by its New York Agency.

One of the two alternative controlling questions which faced the New York courts in rendering judgment upon the rights and liabilities involved in the action was as to the force or effect which they might accord to the acts and transactions proven, upon the assumption that such acts and transactions were licensable and had not been licensed

---

other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided*, however, That the term 'transfer' shall not be deemed to include transfers by operation of law."

Paragraph 4 of the General Ruling answers the question.* It provides that:

> "*Any transfer . . . involved in . . . any action* or proceeding in any Court within the United States *shall*, so far as affected by the Order [No. 8389] and/or this general ruling, *be valid* and enforceable *for the purpose of determining for the parties to the action* or proceeding *the rights and liabilities therein* litigated: . . . ." (Matter in brackets, and italics, ours.)

The action before the State courts had been brought: "for the purpose of determining for the parties"—the plaintiff, and the Superintendent (who was named as a defendant therein)—"the rights and liabilities therein litigated." The right in question was that of the plaintiff, as a creditor of the Bank, to be paid the amount of his claim against it out of the proceeds of its business and property in the possession of the Superintendent as liquidator, in the course of the liquidation; the liability was that of the Superintendent to make such payment. The language of the General Ruling fits exactly the situation so presented. Its mandate respecting the effect to be given the underlying transactions is

*Paragraph 4 in its entirety is as follows:

> "(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of any action or proceeding in any Court within the United States, shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however*, That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

equally unmistakable; those transactions, since they were "involved in" the action, "*shall be valid and enforceable* for the purpose of determining for the parties" those rights and liabilities.

When the case reached the Court of Appeals, it was also faced—as this Court is now faced—with the question of the right and power of the lower courts to render judgment upon the basis of those transactions, and of the validity, the permitted scope, and the effect of such judgment. To that question, also, paragraph 4 of the General Ruling provides the answer. It contains two provisions: first, a general provision authorizing and validating the adjudication of the parties' rights; and, second, a proviso restricting the effect to be given to the judgment rendered thereon.

The clause authorizing and validating the judgment is the clause respecting transfers, which is briefed above. Section 5(b) defines "transfer" as including, *inter alia*, "any judgment". Substituting "judgment" for "transfer" in the opening clause of paragraph 4, we have the following provision:

> "*Any judgment . . . arising out of any action* or proceeding in any Court within the United States *shall*, so far as affected by the Order and/or this general ruling, *be valid and enforceable for the purpose of determining for the parties to the action* or proceeding *the rights and liabilities therein litigated*: . . ." (Italics ours.)

This judgment does determine for the parties—the plaintiff and the Superintendent—the right of the former and the liability of the latter, by reason of the allegedly licensable but unlicensed transactions proven. As such a judgment, it is not erroneous, but is declared to be "*valid*

and enforceable". And, as such a valid and enforceable judgment, it cannot be reversed under the provisions of the Executive Order.

As we have pointed out, under the proviso clause of paragraph 4, the effect which may be given to a judgment is limited; no judgment:

> "... shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

That clause does not limit or contradict the opening clause of the paragraph. It does not provide that a judgment, which purports or attempts to confer or create a greater right, power or privilege than the parties could voluntarily confer or create shall be invalid or unenforceable as a determination of the rights of the litigant parties. It provides only that such judgment shall not have the *additional* force, as a transfer or as a source of new rights or interests, which it describes.

In any event, the proviso clause is not applicable; this judgment is not within its terms. We may assume that, if it had directed payment of the claim without a license, it might have been so. But as modified at the direction of the Court of Appeals it provides exactly the opposite; there can be no payment without a license. And it does not create or confer any greater right, power or privilege upon the plaintiff, or any greater interest in the Bank's (or the Agency's) property than the defendant before this Court—who in this controversy and under this judgment is the Superintendent and not the Japanese Bank—could have

conferred or created voluntarily, by allowing the claim. The New York Banking Law draws no distinction whatever, in so far as the payment or enforceability of claims in liquidation are concerned, between those claims allowed by the Superintendent and those claims established against him by adjudication. Nor is there any difference in the practice followed by the Superintendent, which is simply, in due course, to declare and pay a dividend to all creditors whose claims have been either accepted by him or established against him in the courts,* and that was the course which he actually followed in this liquidation (R. 505). Clearly, therefore, the judgment appealed from did not: "confer or create a greater right, power or privilege with respect to, or interest in" the assets, formerly of the Japanese Bank and now held by the Superintendent as its liquidator, "than the owner of such property [the Superintendent had become such owner, pursuant to federal license, before this action had commenced] could confer or create" voluntarily, by allowing the claim.

In spite of those perfectly clear provisions of the General Ruling, the Superintendent devotes one division of his brief to the contention that: "the decision of the Court of

---

*The Superintendent, in his brief to the Court of Appeals (p. 62), stated the practice as follows:

> "An action against a bank in liquidation differs from an action against a going concern. The action does not result in a judgment enforceable by execution against the assets of the bank. The action does no more than to establish the claim as a valid one against the assets in the hands of the liquidator. (Banking Law § 627 (1, 2). See also *Hamberg* v. *Guaranteed Mortgage Company of New York*, 180 Misc. 276, 283; 38 N. Y. S., 2d 165, 174.) It is in essence an appeal from the rejection of a claim by the Superintendent. (See *Peoples Trust Co.* v. *United States*, 23 Fed. 2d 381.) If successful the claimant is placed in the same position as creditors whose claims have been allowed by the Superintendent."

Appeals improperly gave effect to a prohibited transaction by permitting the assertion of a claim predicated thereon", and another division to the argument that that Court: "improperly gave effect to a prohibited transaction by permitting the creation of an interest in blocked property" (Sup't Br., pp. 20, 26).

We have pointed out that none of the transactions underlying the claim were licensable transactions within the terms or intent of the Executive Order. But even if licensable, the General Ruling declared that, when "involved in . . . any action", they were: "valid and enforceable for the purpose of determining for the parties . . . the rights and liabilities therein litigated . . ."; and under those circumstances the contention that the Court of Appeals: "improperly gave effect to" them "by permitting the assertion of a claim predicated thereon" simply flies in the teeth of the General Ruling's clear mandate, and obvious intent. Indeed, even aside from the General Ruling, the argument that state courts cannot permit the assertion of claims based upon unlicensed transactions contradicts a federal policy respecting litigation based upon such transactions which the federal authorities adopted and publicly declared from the institution of freezing control, and which is still in full force and effect. As the Treasury pointed out in Press Release 34,* commenting upon General Ruling 12:

> "Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United

*Press Service No. 31-28, Treasury Documents Pertaining to Foreign Funds Control, September 15, 1946, pp. 71-73.

States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties."

In *Propper* v. *Clark*, this Court remarked that General Ruling 12 is useful: "as a statement of the administrative determination as to the effect of litigation without a license."

And in this case the Solicitor General, in a Memorandum to this Court supporting the Superintendent's application for certiorari (p. 6, footnote 3; p. 7, footnote 6), said:

"... The Department of Justice (which has sole jurisdiction to determine the licensing questions, Executive Order 9193, §§ 2, 6, 7 F. R. 5205; Executive Order 9989, 13 F. R. 4891) has felt that *after all questions of fact and state law had been definitively settled by the State court adjudications,* it would be appropriate to reconsider the licensing questions involved. ... (italics ours)

"... it is believed that it will now be possible in the light of the clarifications obtained in the *Singer* and *Banque Mellie Iran* cases finally to resolve the licensing issues in many, if not all, of these cases in advance of such litigation. ..."

State courts, like federal courts, are without advisory jurisdiction; they can definitively settle questions of fact and state law only by adjudication, and the entry of judg-

ment determining rights. The New York courts in this case, in determining the issues of state law and fact presented to them, have obviously acted in line with the federal purpose and policy. It is to us inconceivable that the Superintendent should be permitted to attack, as unauthorized, the judgment by which they have done so, and incredible that the Solicitor General should support him in the attempt.

The Superintendent's argument that the decision of the Court of Appeals permits the creation of an interest in blocked property (Sup't Br., p. 26) suggests questions not involved in the above argument. Specifically, his contention is: first, that the "effect" of the decision of the Court of Appeals is "to shift to Singer a portion of the blocked credit which appeared on the books of the Agency in favor of its Yokohama office" (Sup't Br., p. 26); and second, that "the effect of the decision is to confer upon the plaintiff an interest in the blocked property of the Agency itself" (Sup't Br., p. 27). If the statements mean anything other than that, under the judgment, the plaintiff has a claim against the Bank which—if authority under Executive Order 8389 is granted—is payable out of the Bank's property, it is groundless. If it has only that meaning it is irrelevant, since every judgment is payable out of the property of the judgment debtor.

The Superintendent's contention that the "effect" of the judgment is to shift to plaintiff any portion of any blocked credit of the Bank's Yokohama office appearing upon the Agency's books is refuted by the judgment's provisions. If it had directed payment of the claim out of the blocked account of the Yokohama office such an argument might have had substance. But neither the judgment nor the complaint refers to any such account; the action was not tried upon

any such theory, and the Banking Law would not have supported any such claim or liability. What the judgment does direct is that the claim against the Bank shall be paid (if payment is licensed) out of the Bank's assets, in the possession of the Bank's liquidator (R. 90, 590). Under it, the claim is payable regardless of the existence or non-existence of any account of the Yokohama office upon the Agency's books. It clearly is not true that such a judgment transfers any interest in, or imposes any charge or lien upon, any account of the Yokohama office at the Agency, and the argument fails.

Much the same holds true of the argument that the effect of the judgment is to confer upon the plaintiff an interest in the blocked property of the Agency. There is no such entity under New York law as the New York Agency; there is no such owner of property; and there is no such debtor: *Matter of Goebel*, 295 N. Y. 73. What the judgment does do is to direct payment (if licensed) of the Bank's debt out of *the Bank's* blocked property. In so doing it does not subject any new property to the debt, for under the law the Bank's property had always been a fund (formerly referred to as a trust fund) for the payment of its debts. There is nothing to the contrary of the foregoing in this Court's decision in *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, or in any of the New York decisions cited at page 27 of the Superintendent's brief.

Finally, it should be observed that the plaintiff's rights and his so-called preference under the Banking Law are neither created by the judgment nor forbidden by the General Ruling. That Ruling explicitly recognizes and sanctions attachments, liens, garnishments and executions, all of which by their very nature necessarily result in prior-

ities among creditors. The judgment merely determines, under the facts proven, what had been the effect of the seizure of the Bank's property by the Superintendent (pursuant to federal licenses) upon Standard's and plaintiff's rights, under the Banking Law. Such a judgment, it is clear, merely determines for the parties to the action the rights and liabilities therein litigated; it does not confer or create any right or privilege or priority whatever (cf. General Ruling 12, par. 4). Such priority as plaintiff may have stems wholly from the Banking Law and the facts.

POINT V

THE DISALLOWANCE OF INTEREST UPON THE CLAIM CONSTITUTES ERROR.

The Court of Appeals denied plaintiff's right to interest solely because: "since payment has not yet been licensed, plaintiff is not entitled . . . to the accrual of interest thereon." (299 N. Y., at p. 125).

Under the Court's decision and under New York law, interest accrued upon the claim from the date when payment was first licensed. We believe that payment was first authorized by the Treasury's license of January 14, 1942, and respectfully submit that interest should be computed from that date. At the latest, interest should accrue from October 29, 1942.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the New York Court of Appeals should be (a) modified, by striking the provision contained in the

judgment requiring a further license before the judgment can be paid, and by striking the provision contained in the judgment disallowing interest on plaintiff's claim; or, in the alternative, (b) affirmed.

Respectfully submitted,

ALBERT R. CONNELLY
Counsel for Plaintiff
15 Broad Street
New York 5, N. Y.

GEORGE S. COLLINS
GEORGE M. BILLINGS
JACK W. ROBBINS
Of Counsel

April 11, 1950

APPENDIX A

Excerpt from Section 7(b) of the Trading with the Enemy Act (40 Stat. 411, 417).

"Nothing in this Act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States not an enemy or ally of enemy, if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: *Provided*, That such payment shall not be made without the license of the President, general or special, as provided in this Act."